

The Honorable Robert S. Lasnik

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA**

JOSEPH A. NELSON, individually and as Personal Representative of the ESTATE OF JOEL A. NELSON, and its statutory beneficiaries,

Plaintiff,

V.

THURSTON COUNTY, a Washington municipality; RODNEY T. DITRICH, individually; JOHN D. SNAZA, individually, and DOES 1 through 15, individually.

Defendants.

| NO. 3:18-cv-05184-RSL

**DEFENDANT JOHN D. SNAZA'S
SECOND MOTION FOR SUMMARY
JUDGMENT**

NOTE ON MOTION CALENDAR:

January 8, 2021

ORAL ARGUMENT REQUESTED

L. BELIEF REQUESTED

Defendant, Thurston County Sheriff John D. Snaza, respectfully requests that the Court grant his motion for summary judgment pursuant to Fed. Rule Civ. P. 56 on Plaintiff's remaining claim against him under 42 U.S.C. § 1983 based on denial of due process and/or denial of access to the courts.

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II. STATEMENT OF FACTS

This case arises out of the fatal shooting of Joel Nelson (“Nelson”) by Co-Defendant Rodney Ditrich, a Deputy with the Thurston County Sheriff’s Office. In addition to his claims against Deputy Ditrich and Thurston County, Plaintiff asserted two separate and distinct § 1983 claims against Sheriff Snaza in his personal capacity. As described in more detail below, the court previously granted summary judgment in favor of Sheriff Snaza on one of those claims, which was based on allegations that Sheriff Snaza was liable under the Fourth Amendment as an official with supervisory authority over Deputy Ditrich. This second summary judgment motion addresses the other asserted § 1983 claim against Sheriff Snaza, which is based on a theory of denial of due process and/or denial access to the courts. The procedural history and facts relevant to Plaintiff’s claims against Sheriff Snaza are summarized below.

A. District Court's Initial Summary Judgment Rulings and Appeal to the Ninth Circuit

Nelson was contacted by Deputy Ditrich during a routine investigatory stop in a residential area, which quickly escalated as Deputy Ditrich has described in detail in his own declarations about the events precipitating his shooting of Nelson. *See* Dkt.32 and Dkt. 139. Deputy Ditrich testified he used lethal force only after Nelson, who ignored several warnings, attempted to flee and assaulted Ditrich multiple times, finally attempting to wrest control of Ditrich's patrol vehicle and crashing it into another motorist while Deputy Ditrich was trapped in the open driver's side door. Dkt. 32. Deputy Ditrich testified he shot Nelson three times after he was inside the vehicle and engaged in this struggle.

In accordance with Thurston County Sheriff's Department policy, Deputy Ditrich was placed on administrative leave following the shooting incident. The Region 3 Critical Incident Investigation Team ("CIIT"), which is a cooperative team of investigators comprised of staff

1 from five Sheriff's Departments,¹ completed an investigation of the incident. *Id.*, ¶ 14. The
 2 investigation was led by Lewis County. Declaration of John R. Nicholson in Support of
 3 Defendant Snaza's Second Motion for Summary Judgment, Exh. 1 (Snaza dep., pp. 120:10-19,
 4 126:12-127:2) ("Nicholson Decl."). Other than initially securing the scene of the incident and
 5 providing traffic control and other support to the CIIT investigators, the Thurston County
 6 Sheriff's Office did not perform investigative tasks or make decisions about the investigation or
 7 collection of evidence. Dkt. 50, Snaza Decl., ¶ 3. In addition to the CIIT investigation regarding
 8 Deputy Ditrich's use of lethal force, the Thurston County Sheriff's Department Office of
 9 Professional Standards ("OPS"), through Sergeant Ken Clark, completed an investigation for
 10 purposes of ascertaining whether any Sheriff's Department policies had been violated.
 11 Nicholson Decl., Exh. 1 (Snaza dep., p. 150:1-11). Sheriff Snaza was intentionally not
 12 personally involved in these investigations. *Id.*, Exh. 1 (Snaza dep., p. 97:13-20).

13 On January 6, 2016, the CIIT investigators advised that they had completed their
 14 investigation of the incident and released the patrol vehicle back to Thurston County. Dkt. 48,
 15 Phillips Decl., ¶ 4. Sheriff Snaza directed that Deputy Ditrich's patrol vehicle should not be
 16 returned to the County's fleet of law enforcement vehicles, because he did not want his deputies
 17 having to use a vehicle that had been involved in such a traumatic incident. Nicholson Decl.,
 18 Exh. 1 (Snaza dep., pp.114:4-115:18). Dkt. 50, Snaza Decl., ¶ 5. As a result, the County's fleet
 19 manager, Bryan Hanks, began making arrangements to have the vehicle repaired and sold, as it
 20 still had a substantial monetary value. Dkt. 46, Hanks Decl., ¶ 3. On March 25, 2016, Mr. Hanks
 21 notified Nelson's father that the vehicle had been repaired and would be surplused and sold, but
 22 he offered Nelson's father the opportunity to have a qualified expert inspect the vehicle if he
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 26 ¹ Region 3 of the State of Washington is comprised of the Sheriff's Offices in Thurston, Lewis, Pacific,
 Grays Harbor, and Mason Counties. Nicholson Decl., Exh. 1 (Snaza dep., p. 99:8-21). The County that leads the
 team rotates each year. *Id.*, Exh. 1 (Snaza dep., pp. 100:5-11).

1 desired. Nicholson Decl., Exh. 2. Plaintiff's forensic expert Matthew Noedel inspected the
 2 vehicle on April 8, 2016. Dkt. 46, Hanks Decl., ¶ 4.

3 Both Deputy Ditrich and Sheriff Snaza filed motions for summary judgment in December
 4 of 2018. Dkt. 31, 34. On January 24, 2019, Nelson filed a motion for spoliation sanctions based
 5 on the allegation that the defendants had intentionally destroyed evidence he contends should
 6 have been preserved as part of the law enforcement investigations of the shooting. Dkt. 39.
 7 Nelson filed a declaration by his expert Mr. Noedel to support the motion. Dkt. 72. In his
 8 declaration, Mr. Noedel listed evidence from Deputy Ditrich's patrol vehicle which he merely stated
 9 "may have been useful to preserve and evaluate." Dkt. 72 at 3 (emphasis added).

10 On March 11, 2019, the court denied Nelson's motion for spoliation sanctions without
 11 prejudice. Dkt. 98. On March 21, 2019, the court denied the defendants' summary judgment
 12 motions, indicating in its order that it was construing the facts surrounding the shooting incident
 13 in the light most favorable to Nelson as follows:

14 The plaintiff's account of what happened on the evening of January 5, 2016 is a
 15 product of an ear-witness, Mr. [Luis] Ramos, who says he heard one lone shot at
 16 the beginning of the confrontation in his driveway and three more, in quick
 17 succession, about a minute or two later. The first shot was right after Officer Ditrich
 18 allegedly told Nelson to "get down on your knees." Mr. Ramos did not know either
 19 of the parties to the police action. He had no motive to fabricate any part of his
 20 statement about the events of January 5, 2016. From Ramos' statement, the plaintiff
 21 surmises that the first shot mortally wounded Nelson. It entered his right shoulder
 22 blade, travelled back in front and downward, clipping the heart and lodging in the
 23 abdomen, all the while Nelson was on his knees. Thereafter, Nelson got up and
 24 attacked Ditrich, got into the patrol car, and managed to wrestle control of the
 25 gearshift. In the meantime, Ditrich holstered his gun, got his Taser out, threatened
 26 to use it and then administered the Taser, all with little effect. The wires were
 plainly on Nelson's person. Then Ditrich returned to his gun as Nelson accelerated
 the car in reverse. Ditrich fired three more shots in quick succession as the patrol
 car spun a Subaru in the middle of the road and continued across the road and struck
 trees and bushes.

Dkt. 109 at 4-5. The court characterized Nelson's version of events as "highly improbable," but
 nevertheless held a jury had to decide what actually occurred. *Id.* at 3. Although the court's

1 summary judgment order did not address Sheriff Snaza's alleged wrongful conduct, it denied
 2 Sheriff Snaza's motion for summary judgment. *Id.* at 5.

3 **B. Interlocutory Appeal and District Court's Rulings on Remand**

4 Deputy Ditrich and Sheriff Snaza both sought interlocutory review of the denial of their
 5 summary judgment motions, and on appeal the Ninth Circuit upheld the denial of summary
 6 judgment as to Plaintiff's claim against Deputy Ditrich based on viewing the evidence of what
 7 occurred when Sheriff Snaza shot Nelson, as described above. Dkt. 155. However, the Ninth
 8 Circuit reversed and remanded with respect to Sheriff Snaza based on the court's failure to
 9 discuss the reasons for its denial of his summary judgment motion:

10 The district court . . . identified no issues of material fact relating to Snaza, and
 11 failed to explain the basis for denying his motion. We accordingly reverse the
 12 district court's order as to Snaza so that the district court may undertake the
 requisite factual examination of the allegations against him.

13 *Id.* at 4.

14 After the Ninth Circuit remanded, on June 1, 2020 this court issued an order granting
 15 Sheriff Snaza's summary judgment motion on Plaintiff's supervisory liability claim under the
 16 Fourth Amendment. Dkt. 157 at 4-5. But the court determined Plaintiff had also asserted a claim
 17 based on Sheriff Snaza's alleged involvement in the destruction of evidence during the law
 18 enforcement investigation of the shooting incident, which none of the parties had previously
 19 addressed. *Id.* at 5. The court characterized this claim as a "Fourteenth Amendment due process
 20 claim" with the due process interest being Nelson's wrongfully death causes of action. *Id.*

21 On June 15, 2020, Sheriff Snaza filed a motion requesting that the Court reconsider the
 22 partial denial of his motion for summary judgment. Dkt. 158. On July 7, 2020, the court denied
 23 the motion to reconsider due to the fact this claim had not been briefed by the parties in the
 24 earlier summary judgment briefing, but it ruled Sheriff Snaza could file a new summary
 25 judgment motion:

If Snaza wishes to attack the legal sufficiency of Nelson's § 1983 due process claim he may do so in a new motion. Nelson's claim is vague, but he alleges a "conspiracy and efforts to deprive the Estate of Joel A. Nelson of its property rights without due process of law," with the property rights being the cause of action related to Joel Nelson's death. Complaint, Dkt. #1, at 9. This theory and the fact supporting it align with the constitutional right to meaningful access to the courts, which is protected by the First and Fourteenth Amendments. *Delew v. Wagner*, 143 F.3d 1219, 1222 (9th Cir. 1998)(claim arising from police coverup of evidence regarding vehicular death); *Harrell v. Cook*, 169 F.3d 428, 432 (7th Cir. 1999)(claim arising from police mishandling of evidence).

Snaza correctly points out that, under Ninth Circuit precedent, such claims do not accrue until the plaintiff has actually lost in court on the underlying wrongful death claim. *Delew*, 143 F.3d at 1223; *see also Roberts v. KVSP Investigation Servs. Unit*, No. 119CV01055SABPC, 2019 WL 4054020, at *3 (E.D. Cal. Nov. 25, 2019)(["C]ourts find that a cover-up claim is premature when the plaintiff's action seeking redress for the underlying violations remains pending."). This issue, as well as the issue of whether Nelson has otherwise alleged a violation of a clearly established due process right, warrant full briefing by the parties that should not be addressed for the first time in a motion for reconsideration.

Dkt. 159 at 7.

III. STATEMENT OF ISSUES

Should Plaintiff's remaining 42 USC § 1983 claim against Sheriff Snaza be dismissed because (1) Sheriff Snaza is entitled to qualified immunity as there is no evidence of an actionable constitutional violation and (2) Plaintiff's remaining claim against Sheriff Snaza is, at a minimum, premature where Plaintiff's federal and state wrongful death causes of action are still pending?

IV. EVIDENCE RELIED UPON

Sheriff Snaza relies upon the pleadings and the court's file herein, and specifically the following documents previously filed with the Court:

- Declaration of Deputy Rodney Ditrich with exhibits thereto (Dkt. 32);
- Declaration of Bryan Hanks (Dkt. 46);
- Declaration of Gordon Phillips with exhibits thereto (Dkt. 48);
- Declaration of Sheriff John. D. Snaza (Dkt. 50);
- Declaration of Matthew Noedel with exhibits (Dkt. 72);

1 • Declaration of Rodney Ditrich (Dkt. 139).

2 Sheriff Snaza further relies upon the following documents filed contemporaneously with
3 this motion:

4 • Declaration of John R. Nicholson in Support of Defendant John D. Snaza's
5 Second Motion for Summary Judgment with Exhibits 1-2 thereto.

6 Additionally, Sheriff Snaza relies on the lack of evidence to support Plaintiff's claims.

7 **V. AUTHORITY**

8 Summary judgment is appropriate if there is no issue as to any material fact and the
9 moving party is entitled to judgment as a matter of law. Fed. Rule Civ. P. 56 (c); *see Celotex*
10 *Corp. v. Catrett*, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986); *Anderson v.*
11 *Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). There is no
12 genuine issue of fact if the party opposing the motion "fails to make an adequate showing
13 sufficient to establish the existence of an element essential to that party's case, and on which that
14 party will bear the burden of proof at trial." *Celotex*, 477 U.S. at 322. A summary judgment
15 motion cannot be defeated by relying solely on conclusory allegations unsupported by
16 evidentiary facts. *Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989). The evidence must be
17 viewed in the light most favorable to the non-moving party. *United States v. City of Tacoma*,
18 332 F.3d 574, 578 (9th Cir. 2003). However, "[t]he mere existence of a scintilla of evidence in
19 support of the nonmoving party's position is insufficient." *Triton Energy Corp. v. Square D Co.*,
20 68 F.3d 1216, 1221 (9th Cir. 1995). Summary judgment is required if, on the record taken as a
21 whole, a rational trier of fact could not find in favor of the non-moving party. *Matsushita Elec.*
22 *Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986).

23 Despite Sheriff Snaza's undisputed testimony that he was not involved in the
24 investigation of the Nelson shooting incident or responsible for overseeing the collection or
25 preservation of evidence, when the court decided his most recent motion for reconsideration it

1 ruled that “a jury could reasonably infer that there was some deliberate effort to cover up the
 2 incident. . . . If a cover up took place, Snaza’s presence and responsibilities at the scene,
 3 knowledge of the investigation’s findings and decision to nonetheless promptly dispose of
 4 Ditrich’s vehicle could support his deliberate involvement.” Dkt. 159 at 5. Therefore, for
 5 purposes of this motion only, Sheriff Snaza accepts that a jury could reach this conclusion.

6 But even accepting this interpretation of the evidence, Plaintiff’s remaining claim against
 7 Sheriff Snaza must be dismissed. First, qualified immunity requires dismissal of any claim based
 8 on denial of access to the courts, because there is no constitutional violation unless Sheriff
 9 Snaza’s conduct has rendered a court remedy that would otherwise be available to Plaintiff
 10 completely ineffective. Here, Plaintiff has been permitted to proceed to trial with his causes of
 11 action against Deputy Ditrich and the County arising out of the alleged wrongful death of Nelson.
 12 Moreover, despite Plaintiff’s claims that evidence was improperly destroyed or not collected,
 13 Plaintiff can make no showing that any of the allegedly missing evidence is relevant to a material
 14 fact in dispute. Because Plaintiff is unable to point to any lost evidence that would prove a
 15 material fact disputed by the defendants, as a matter of law he cannot establish that Sheriff Snaza
 16 has rendered any remedy ineffective. Sheriff Snaza is entitled to qualified immunity on
 17 Plaintiff’s remaining claim, and it should be dismissed with prejudice.

18 Second, even if the court declines to dismiss this remaining claim against Sheriff Snaza
 19 with prejudice, it must at least dismiss it without prejudice. In its earlier order, this court has
 20 already recognized that Ninth Circuit makes clear that a claim for denial of access to the courts
 21 is premature until Plaintiff loses in court on his underlying wrongful death claims. Even if the
 22 court believes Plaintiff could eventually establish that Sheriff Snaza’s conduct rendered
 23 Plaintiff’s wrongful death remedies ineffective, he certainly will be unable to do so until he has
 24 gone to trial with his claim against Deputy Ditrich and lost that claim at trial. The Ninth Circuit
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1 has held that in such a situation, the proper remedy is to dismiss the denial of access to the courts
 2 claim without prejudice.

3 Last, to the extent the court has suggested that Plaintiff has asserted any type of denial of
 4 due process claim that is distinct from his claim for denial of access to the courts, Sheriff Snaza
 5 is entitled to qualified immunity. Plaintiff cannot establish any other type of procedural or
 6 substantive due process violation. While federal courts have recognized denial of due process
 7 claims where exculpatory evidence is destroyed and a criminal defendant's liberty interests are
 8 at stake, these are not the facts here where the allegedly missing evidence will only be used in a
 9 civil lawsuit. Further, Plaintiff is unable to make the requisite showings of bad faith and
 10 materiality required by this line of cases.

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12 **A. Plaintiff's Remaining Denial of Access to the Courts § 1983 Claim Should Be
 13 Dismissed with Prejudice, Because He Cannot Establish that Any Destruction of
 14 Evidence Has Resulted in Any Court Remedy Being Rendered Ineffective**

15 The qualified immunity doctrine provides a public official performing discretionary
 16 functions immunity in a civil action for damages, provided his or her conduct does not violate
 17 clearly established federal statutory or constitutional rights of which a reasonable person would
 18 have known. *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982).
 19 Qualified immunity is an "immunity from suit rather than a mere defense to liability[.]" *Mitchell*
 20 *v. Forsyth*, 472 U.S. 511, 526, 105 S. Ct. 2806, 86 L. Ed. 2d 272 (2001).

21 The court addresses two questions in determining whether an official is entitled to
 22 qualified immunity: (1) whether a constitutional right has been violated considering the facts in
 23 the light most favorable to the party asserting the injury and (2) whether the right was clearly
 24 established viewed in the specific context of the case. *Saucier v. Katz*, 533 U.S. 194, 201-02,
 25 121 S. Ct. 2151, 150 L. Ed. 2d 272 (2001). The court has discretion to consider these questions
 26 in any order. *Pearson v. Callahan*, 555 U.S. 223, 236, 129 S. Ct. 808, 172 L. Ed. 2d 565 (2009).
 The Supreme Court has reiterated "the longstanding principle that 'clearly established law'

1 should not be defined ‘at a high level of generality.’” *White v. Pauly*, ____ U.S. ___, 137 S. Ct.
 2 548, 552, 196 L. Ed. 2d 463 (2017) (quoting *al-Kidd*, 563 U.S. at 742). A Government official’s
 3 conduct violates clearly established law when, at the time of the challenged conduct, “[t]he
 4 contours of [a] right [are] sufficiently clear” that “every reasonable official would [have
 5 understood] that what he is doing violates that right.” *Anderson v. Creighton*, 483 U.S. 635, 640,
 6 107 S. Ct. 3034, 97 L. Ed. 2d 523 (1987).

7 Where the plaintiff brings a denial of access claim, “the complaint must identify a remedy
 8 that may be awarded as recompense but not otherwise available in some suit that may yet be
 9 brought.” *Christopher v. Harbury*, 536 U.S. 403, 415, 122 S.Ct. 2179, 153 L.Ed.2d 413 (2002).
 10 The Ninth Circuit addressed this type of claim in *Delew v. Wagner*, 143 F.3d 1219 (9th Cir.
 11 1998). There, the estate and parents of bicyclist Erin Rae Delew, who died when she was struck
 12 by a vehicle, brought § 1983 claims asserting law enforcement conspired to cover up the facts
 13 of the death by not adequately investigating and failing to preserve physical evidence. *Id.* at
 14 1221-22. The Court held that “[t]o prevail on their claim, the Delews must demonstrate that the
 15 defendants’ cover-up violated their right of access to the courts by rendering ‘any available state
 16 court remedy ineffective.’” *Delew*, 143 F.3d at 1222-23 (citing *Swekel v. City of River Rouge*,
 17 119 F.3d 1259, 1264 (6th Cir. 1997)). Because the Delews’ wrongful death lawsuit remained
 18 pending in state court, the Ninth Circuit found “it is impossible to determine whether this has in
 19 fact occurred” and concluded the plaintiffs’ § 1983 action should therefore be dismissed without
 20 prejudice. *Delew*, 143 F.3d at 1223. The Court reasoned, “[b]y disposing of the case in this
 21 fashion, the Delews would have the opportunity to re-file their section 1983 action if in fact the
 22 defendants’ alleged cover-up actually rendered all state court remedies ineffective.” *Id.* This
 23 result was necessitated because a “plaintiff cannot merely guess that a state court remedy will be
 24 ineffective because of a defendant’s actions.” *Delew*, 143 F.3d at 1222 (quoting *Swekel*, 119
 25 F.3d at 1264).
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1 In *Delew*, the Ninth Circuit adopted the Sixth Circuit's reasoning in *Swekel*. In *Swekel*,
 2 the Sixth Circuit held that where the defendant's alleged wrongful conduct occurs prior to when
 3 a lawsuit is filed, the plaintiff must establish that it denied him "effective" and "meaningful"
 4 access to the courts. *Swekel*, 119 F.3d at 1263 (citing *Bounds*, 430 U.S. at 822). A plaintiff "can
 5 only do this by showing that the defendants' actions foreclosed her from filing suit in state court
 6 or rendered ineffective any state court remedy she previously may have had." *Swekel*, 119 F.3d.
 7 at 1264 (*Crowder*, 884 F.2d at 812-13; *Bell*, 746 F.2d at 1261; *Ryland*, 708 F.2d at 974-75.). The
 8 court noted that "[i]n most instances, state courts can address pre-filing abuses by tolling the
 9 statute of limitations or allowing for a 'spoliation of evidence' lawsuit." *Swekel*, 119 F.3d at
 10 1264.

11 Sheriff Snaza's conduct has not rendered Plaintiff's wrongful death claims ineffective. This
 12 Court has previously held Plaintiff's wrongful death causes of action under both state law and §
 13 1983 have survived summary judgment and must proceed to trial. The Ninth Circuit has now
 14 affirmed this holding. While Plaintiff's claims against Deputy Ditrich may succeed or fail on the
 15 merits, he has not been denied the ability to establish his claims.

16 As the Court in *Swekel* observed, in most cases pre-filing evidentiary abuses can be
 17 addressed with remedies available in the underling case itself, including spoliation remedies.
 18 Plaintiff previously filed a motion for spoliation sanctions based on the same destruction of
 19 evidence theory that his access to the courts claim is based upon, and this court denied it without
 20 prejudice. In support of the spoliation motion, Plaintiff filed a declaration by his expert Matthew
 21 Noedel in which Mr. Noedel listed evidence from Deputy Ditrich's patrol vehicle which he stated
 22 "may have been useful to preserve and evaluate." Dkt. 72 at 3 (emphasis added). This type of
 23 speculative assertion is insufficient to establish that the destruction of any of the evidence at issue
 24 has rendered any remedies ineffective.

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1 In criticizing Lewis County's CIIT investigation of the Nelson shooting in its order
 2 following remand from the Ninth Circuit, the court focused on blood spatter and DNA evidence
 3 from inside Deputy Ditrich's patrol vehicle as well as photographs of the inside of the vehicle.
 4 Dkt. 157 at 5-6. But Plaintiff has never explained what this missing evidence would prove.
 5 Deputy Ditrich concedes he shot Nelson three times while he was inside the vehicle. Dkt. 32 at
 6 11. Similarly, under the "highly improbable" theory advanced by Plaintiff that the court
 7 described in its March 2019 order denying Deputy Ditrich's summary judgment motion, Plaintiff
 8 claims Deputy Ditrich shot Nelson three times while he was inside the vehicle. Dkt. 109 at 4-5.
 9 Since it is undisputed by all parties that Nelson was shot multiple times while inside the vehicle,
 10 DNA, blood spatter, and photographic evidence of the inside of the vehicle would not serve to
 11 prove any material fact that is in dispute. Without a showing that the allegedly missing evidence
 12 renders his action against Deputy Ditrich and the County completely ineffective, Plaintiff cannot
 13 establish an actionable claim for denial of access to the Courts. As a result, this court should hold
 14 that Sheriff Snaza has qualified immunity to this claim and dismiss it with prejudice.

15 **B. At the Very Minimum, Plaintiff's Denial of Access to the Courts Claim is Premature
 16 and Must Be Dismissed Without Prejudice**

17 Even if the Court sets aside the fact that Plaintiff cannot establish that any allegedly
 18 missing evidence is material to a disputed fact in this case, the Court has already correctly
 19 recognized Plaintiff's claim is premature. Although it denied Sheriff Snaza's earlier motion to
 20 reconsider the partial denial of summary judgment on Plaintiff's due process/denial of access
 21 claim, it agreed that "under Ninth Circuit precedent, such claims do not accrue until the plaintiff
 22 has actually lost in court on the underlying wrongful death claim." Dkt. 159 at 6 (citing *Delew*,
 23 143 F.3d at 1223). Courts throughout this circuit have determined that dismissal without
 24 prejudice is required where a denial of access claim is brought while the underlying wrongful
 25 death causes of action are still pending in state court. *See, e.g., Karim-Panahi v. Los Angeles*
 26 *Police Dept.*, 839 F.2d 621 (9th Cir. 1988); *Burns v. City of Concord*, 99 F.Supp.3d 1007, 1028-

1 29 (N.D. Cal. April 9, 2015); *Peterson v. Miranda*, 991 F.Supp.2d 1109, 1117 (D. Nevada Jan.
 2 10, 2014); *Roberts v. KVSP Investigation Servs. Unit*, No. 119CV01055SABPC, 2019 WL
 3 405020, at *3 (E. D. Cal. Aug. 28, 2019) report and recommendation adopted, No.
 4 119CV01055AWISABPC, 2019 WL 6307654 (E.D. Cal. Nov. 25, 2019); *McDaniel v. Hubbard*,
 5 No. CIV S-07-1189 JAM JFM (PC), 2010 WL 3220197, at *2 (E.D. Cal. Aug. 13, 2010). This
 6 is necessarily so, because the law is clear that if Nelson succeeds in his lawsuit against Deputy
 7 Ditrich his denial of access claim is moot. *Dooley v. Reiss*, 736 F.2d 1392, 1394-95 (9th Cir.
 8 1984). If the Court does not dismiss Plaintiff's remaining claim against Sheriff Snaza with
 9 prejudice based on qualified immunity, at a minimum it should dismiss the claim without
 10 prejudice as premature.

11 **C. Sheriff Snaza is Entitled to Qualified Immunity on Any Due Process Claim that the
 12 Court Conceivably Believes Plaintiff Has Asserted that is Independent of His Denial
 of Access to the Courts Claim**

13 In partially denying Sheriff Snaza's earlier summary judgment motion, the court has at
 14 times characterized Plaintiff's remaining claim as based on a denial of due process, and the single
 15 case cited for this theory was *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 102 S.Ct. 1148, 71
 16 L.Ed.2d 265 (1982). However, *Logan* does not reflect a violation of clearly established law here.
 17 In *Logan*, a discharged employee filed a charge with a state administrative commission under
 18 the Illinois Fair Employment Practices Act, and the commission inadvertently failed to comply
 19 with a statutory requirement that it schedule a fact-finding conference within 120 days of the
 20 charge. The Illinois Supreme Court held that the commission's failure to comply with this
 21 procedural requirement required dismissal of the charge and deprived the commission of
 22 jurisdiction. Reversing the Illinois Supreme Court, the U.S. Supreme Court observed that "a
 23 cause of action is a species of property protected by the Fourteenth Amendment's Due Process
 24 Clause" and held the employee was entitled to have the commission decide his charge on the

1 merits. *Id.* at 428-35. *Logan* had nothing to do with law enforcement investigations or the
 2 destruction of evidence.

3 *Logan* involved the strictures of procedural due process. *Id.* at 434 (“[I]t has become a
 4 truism that ‘some form of hearing’ is required before the owner is finally deprived of a protected
 5 property interest.”) Whether conduct violates procedural due process depends upon the
 6 balancing test set forth in *Matthews v. Eldridge*, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18
 7 (1976).² When analyzing qualified immunity in the context of alleged procedural due process
 8 violations, federal courts have observed that “[i]f the existence of a right or the degree of
 9 protection it warrants in a particular context is subject to a balancing test, the right can rarely be
 10 considered ‘clearly established’ at least in the absence of closely corresponding factual and legal
 11 precedent.” *Baker v. Racansky*, 887 F.2d 183, 187 (9th Cir 1989)(quoting *Myers v. Morris*, 810
 12 F.2d 1437 (8th Cir. 1987)(internal quotation marks omitted)). Neither *Logan* nor its progeny hold
 13 that Sheriff Snaza’s conduct was a violation of a clearly established procedural due process right.

14 In contrast to procedural due process, substantive due process “forbids the government
 15 from depriving a person of life, liberty, or property in such a way that ‘shocks the conscience’
 16 or ‘interferes with rights implicit in the concept of ordered liberty.’” *Nunez v. City of Los
 17 Angeles*, 147 F.3d 867, 871 (9th Cir. 1998)(quoting *United States v. Salerno*, 481 U.S. 739, 746,
 18 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987)). “[T]he Court has always been reluctant to expand the
 19 scope of substantive due process because guideposts for responsible decision making in this
 20 uncharted area are scarce and open-ended.” *Collins v. Harker Heights*, 503 U.S. 115, 125, 112
 21 S.Ct. 1061, 117 L.Ed.2d 261 (1992). Just as in the case of procedural due process, where there
 22 is no clear consensus of authority recognizing that conduct constitutes a substantive due process

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 24 ² “[I]dentification of the specific dictates of due process generally requires the consideration of three
 25 distinct factors. First, the private interest that will be affected by the official action; second, the risk of erroneous
 26 deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute
 procedural safeguards; and finally, the Government’s interest, including the function involved and the fiscal and
 administrative burdens that the additional or substitute procedural requirements would entail.” *Mathews*, 424 U.S.
 at 335.

1 violation, qualified immunity should be granted. *See, e.g., Lum v. Jensen*, 876 F.2d 1385, 1389
 2 (9th Cir. 1989).

3 Federal courts have developed a body of caselaw addressing when destruction of
 4 evidence amounts to a denial of due process for defendants in criminal cases whose liberty
 5 interests are at stake. *See, e.g., Arizona v. Youngblood*, 488 U.S. 51, 109 S.Ct. 333, 102 L.Ed.2d
 6 281 (1988); *California v. Trombetta*, 467 U.S. 479, 489, 104 S.Ct. 2528, 81 L.Ed.2d 413 (1984).
 7 There are two showings that must be satisfied to proceed with such a claim:

8 In order for destruction of evidence to rise to the level of a constitutional violation,
 9 a party must make two showings. First, that the government acted in bad faith, the
 10 presence or absence of which “turns on the government’s knowledge of the
 11 apparent exculpatory value of the evidence at the time it was lost or destroyed.”
United States v. Cooper, 983 F.2d 928, 931 (9th Cir. 1993)) (citing *Arizona v. Youngblood*, 488 U.S. 51, 56-57, 109 S.Ct. 333, 102 L.Ed.2d 281 (1988)). Second,
 12 that the missing evidence is “of such a nature that the defendant would be unable
 13 to obtain comparable evidence by other reasonably available means.” *California v. Trombetta*, 467 U.S. 479, 489, 104 S.Ct. 2528, 81 L.Ed.2d 413 (1984); *Cooper*, 983
 14 F.2d at 931. Another configuration of this test requires the showing of bad faith
 15 where the evidence is only potentially useful and not materially exculpatory. *Del Toro-Barboza*, 673 F.3d at 1149. For evidence to be materially exculpatory, its
 16 exculpatory nature must be apparent. *Id.*

17 *United States v. Sivila*, 714 F.3d 1168 (9th Cir. 2013). The Ninth Circuit has applied this standard
 18 in civil actions brought against law enforcement under § 1983 based on its failure to preserve
 19 evidence in a related criminal proceeding. *See, e.g., Cannon v. Polk County*, 702 Fed. Appx. 527,
 20 530 (9th Cir. 2017); *Grimes v. Bay Area Rapid Transit*, 218 Fed. Appx. 660, 661 (9th Cir. 2007).

21 The *Youngblood/Trombetta* line of cases does not hold that a failure to preserve evidence
 22 for purposes of claims to be asserted in civil litigation gives rise to a constitutional violation.
 23 Because there is no related criminal proceeding such that any evidence here could be
 24 characterized as exculpatory, the *Youngblood/Trombetta* line of cases do not recognize any
 25 clearly established right at issue in the case at bar. Even if the Court were to engage in a strained
 26 interpretation of this line of cases to extend their reasoning to allow due process claims based on

1 destroyed evidence related to civil causes of action, qualified immunity would still apply. At a
 2 minimum, in order to establish bad faith in the civil context Plaintiff would be required to show
 3 (1) Sheriff Snaza recognized the likelihood of civil wrongful death claims; (2) Sheriff Snaza
 4 knew the destroyed evidence was material to those claims; and (3) the destroyed evidence was
 5 of such a nature that Plaintiff would be unable to obtain comparable evidence by other reasonably
 6 available means.

7 Again, Plaintiff has never drawn any connection between the evidence allegedly
 8 destroyed and any fact of import supporting his claims against Deputy Ditrich. There is nothing
 9 indicating that the preservation of any evidence identified by Plaintiff's expert Mr. Noedel would
 10 make it more or less likely that Deputy Ditrich used excessive force or engaged in any other type
 11 of wrongful conduct. Thus, even extending the *Youngblood/Trombetta* reasoning to the civil
 12 context, Plaintiff would not be able to establish any of the items are material to a disputed fact,
 13 much less exculpatory. As a result, he is entitled to qualified immunity to any claim pursued
 14 under this line of due process case law.

15 VI. CONCLUSION

16 For all the forgoing reasons, the court should grant Sheriff Snaza's summary judgment
 17 motion and dismiss Plaintiff's remaining claim against him with prejudice. In the alternative,
 18 Plaintiff's remaining claim against Sheriff Snaza should be dismissed without prejudice as
 19 premature.

20 DATED this 17th day of December, 2020.

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CERTIFICATE OF SERVICE

I certify that on the 17th day of December, 2020, I caused a true and correct copy of this document to be served on the following in the manner indicated below:

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DATED this 17th day of December, 2020, in Renton, Washington.

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